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ON TRACING

Turning to the decisions in Madras, the earliest decisions are those which arose in the insolvency of Messrs. Arbuthnot & Co. The first among them is that of *Official Assignee of Madras* v. *Smith.*[24] There a Mr. Smith sent Rs. 627 to Messrs. Arbuthnot & Co. to keep in fixed deposit along with another Rs. 573 which he proposed to remit. Messrs. Arbuthnot & Co. failed before the latter remittance and the question was if Mr. Smith was entitled to be repaid Rs. 627, which had been kept in suspense account, out of the general assets. The Commissioner in Insolvency made the order as prayed, but on appeal that order was set aside and amongst the appellate judges was Mr. Justice (now Sir John) Wallis. The actual decision was founded on the well-known decision of *Foley* v. *Hill,*[25] which established that the relation between a banker and customer is only that of debtor and creditor, that no kind of fiduciary relationship exists between them, and that the banker is entitled to make use of any money that comes into his hands, for profit in the ordinary course of business as if it were his own, unless there were specific directions to the contrary. Their Lordships held that there were no directions to the contrary from Mr. Smith so as to render the general rule inapplicable, and consequently held, reversing the learned Commissioner's judgment that Mr. Smith was entitled to rank only as a creditor. This decision, however, was dissented from by Abdur Rahim J. in *Official Assignee of Madras* v. *Rajam Aiyar*[26] on the ground of the distinction taken by him in *Official Assignee of Madras* v. *Oriental Government Security Life Assurance Co.,*[27] *viz.*, that the claimant whose money it was that was held

24. (1908) I. L. R. 32 M. 68. 25. (1848) 2 H. L. C 28: 9 E. R. 1002.
26. (1909) I. L. R. 33 M. 299. 27. (1909) I. L. R. 33 M. 150.

by the bank, was not a customer so as to enable the bank to appropriate, in their usual course of business, the moneys, as if they were the moneys of a customer. It was a case to which the general rule was inapplicable not because there were instructions to the contrary but because the individual was not himself a customer, and the general rule referred to was only between a banker and a customer. Abdur Rahim J.'s view was also upheld on Letters Patent Appeal so that the dissent from *Official Assignee of Madras* v. *Smith*[24] stands affirmed.

But the actual decision apart, there are loose observations, which, though they have only the value of *obiter dicta,* deserve to be considered. It is possible that in view of the ground of the ultimate decision, these were not scanned with care before they were made, and it is clear that the authorities upon which they are statedly founded, do not go the full length of the observations themselves. On page 69, it is stated that if Messrs. Arbuthnot received a sum "in a fiduciary capacity and were under a duty to keep it separate from their own moneys and not to use it, then, even though they in fact mixed it with their own moneys, it can no doubt be recovered out of the general assets of the insolvent on the principle explained by Sir George Jessel M. R. in In re *Hallett's Estate.*[12] Then their Lordships quote that principle, which, it is submitted, is accurately stated. The objection, however, is to the statement of the law by deduction by the learned Judges, from the principle of Jessel M. R.'s judgment, correctly quoted by them, *viz.,* that that principle enabled a recovery out of the general assets of the insolvent. Jessel M. R. in In re *Hallett's Estate*[12] did not lay this down and in that case itself the proceeds of the Russian bonds which the trustee wrongfully converted, stood identified with the funds in the bank. "The moneys remained at his bankers mixed with his own moneys at the time of his death, *i.e.,* he had not drawn out that money from his bankers." To deduce from this statement of the law that a recovery is possible from the general assets without reference to the identifiable existence of the trust fund mixed in that mass is to read into *Hallett's case*[12] something which is not there. It is no doubt true, that though at earlier times the doctrine that money had no earmark, by itself stood in the way of a tracing order being made in the case of trust money mixed with other private moneys, later decisions explained the doctrine with reference to the condition of money passing into currency and enabled

12. (1880) 13 Ch. D. 696. 24. (1908) I. L. R. 32 M. 68.

tracing in the case of money where it stood identified. Identification in some form, of the original fund, in the assets sought to be proceeded against is without question a *sine qua non* for a tracing order. Such identification may be proved as a fact, or as pointed out by Lord Dunedin, in *Sinclair* v. *Brougham,*[20] at the utmost, as a necessary presumption of fact from the existence of a proved "superfluity" unaccounted for by the defendant, but for the original reception of trust moneys. There is no authority for further extending the doctrine of tracing as available against any general assets.

The decision under consideration then refers to Ex parte *Dale & Co.*[17] and states that the Court of Appeal in holding that the actual decision in that case was wrong, held that the "proper decision would have been to allow the remitting creditor to recover the whole proceeds of the cheque out of the general assets." There seems to be no warrant in the language of the reference to Ex parte *Dale & Co.*[17] in In re *Hallett's Estate*[12] for saying that the Court of Appeal said that an order to pay out of the general assets should have been made in that case. It is unnecessary to state the opposite view that the decision in Ex parte *Dale & Co.*[17] was itself right, and that the criticism of Jessel M. R. was uncalled for in view of Fry J.'s own explanation in the judgment under appeal before Jessel M. R. In fact, in In re *Hallett's Estate*[12] Jessel M. R. was affirming the decision of Fry J.

Then there is a continuous series of four cases beginning from *Official Assignee of Madras* v. *Ramachandra Iyer.*[28] In the first two cases Munro and Abdur Rahim JJ., in the Appellate Court differed, but only as to the proper inference of fact to be drawn in the case. The law is correctly stated at page 142 in the judgment of Abdur Rahim J. He correctly says that the "doctrine of following trust property is no longer confined to properties which are capable of being traced *in specie,* although it might have been so in olden days. The modern developments of equity enabled the Court to follow trust money in all its transmutations, and to seize upon the fund or property into which it is traced for the purpose of making good thereout the trust funds."

The second case is *Official Assignee of Madras* v. *Lupprian*[29] and it went on appeal in I. L. R. 34 Mad. 121. It is

12. (1880) 13 Ch D. 696.
17. (1879) 11 Ch. D. 772.
20. (1914) A. C. 398.
28. (1909) I. L. R. 33 M. 134.
29. (1909) I. L. R. 33 M. 145.

instructive that both the learned Judges agreed that as between a banker and customer, the pre-existing relation of debtor and creditor might get changed into one of a fiduciary character by appropriate actings of parties. In that case the customer gave directions to the bank to utilise the money with them on maturity for a certain purpose, and the bank replied that the instruction will be carried out in due course. Munro J. at first thought that this was sufficient to change the character of banker and customer into one of a fiduciary relationship, though when he heard the appeal in *Official Assignee of Madras* v. *Lupprian*[29-a] he was willing to change his view. Abdur Rahim J. differed. He said that "some unequivocal act on the part of the debtor showing that he had changed his position into that of a bailee" was necessary, and that "a mere promise to carry out the directions of the customer . . . can have no higher legal effect . . . than a promise to pay the debt." The ultimate decision was in accordance with Abdur Rahim J.'s judgment.

A similar principle was applied in the third case, *Official Assignee of Madras* v. *Oriental Government Security Life Assurance Co.*,[27] and the two learned Judges concurred in the result. Munro J. took the view that the claimant had completed a demand for payment upon the bank before insolvency, so that thereafter, failing to remit, the bank held as agent for the claimant. Abdur Rahim J. based his judgment on the ground that the person whose money it was under the directions of the remitter, was not then a customer of the bank so as to enable the bank to appropriate the amount as customer's moneys in the usual course.

The fourth case, *Official Assignee of Madras* v. *Krishnasami Naidu*,[30] is one of importance, and it is of frequent application in this country. In fact later decisions of this Court have had to consider it. In that case the two learned Judges, Munro and Abdur Rahim JJ. concurred in their conclusions, though they differed in their reasoning. A settlor appointed the five persons who were at the time carrying on business as Messrs. Arbuthnot & Co. as trustees, defining that term as including "members or member for the time being constituting the firm of Messrs. Arbuthnot & Co.," and reserved power for himself, and after his death to the surviving or continuing trustees, to appoint a new trustee in the place of one who had died, etc., the result being an ultimate possibility of all trustees being per-

27. (1909) I. L. R. 33 M. 150. 29a. (1910) I. L. R. 34 M. 121.
30. (1909) I. L.R. 33 M. 154.

sons in no way connected with Messrs. Arbuthnot & Co. The settlor defined the purpose of the trust and directed that the trustees should invest amounts in their own name with Messrs. Arbuthnot & Co. The application was for preferential payment on behalf of the beneficiary, by three of the trustees who having been appointed to such office in the interval, were not members of Messrs. Arbuthnot & Co. The learned Judges concurred in rejecting the claim for preferential payment and holding that there was only a relation of debtor and creditor.

This conclusion, it is submitted, is undoubtedly correct on the one fact that the settlor authorised the investment with Messrs. Arbuthnot & Co. Even assuming that Messrs. Arbuthnot & Co., as such, were the nominated trustees, the utilisation by Messrs. Arbuthnot & Co. of the trust moneys in their business, as if they were their own, would have been a legitimate use of the moneys and not one in breach of trust. This is sufficient to put the claimant for tracing out of court. But Munro J. sought to make a distinction of the fact that in the settlor's mind, the trustees *qua* trustees, were different from the bankers *qua* bankers, though they might happen to comprise the same individuals. He thought that this difference in their legal character as contemplated by the settlor put the deposit in Messrs. Arbuthnot & Co. on the same footing as if it was a deposit with a stranger bank, with the consequence of creating the relationship of a mere banker and customer, and that the trustees held in trust only what was recoverable in whole or in part from the bank.

Abdur Rahim J. did not recognise the distinction which Munro J. sought to make out. He stated that that distinction might be relevant where a question of fixing the bank with notice of the trust by reason of one of its members being himself a trustee should arise, as it did, according to the judgment of Vaughan Williams J. in In re *Hallett & Co.*, Ex parte *Blane*.[21] He properly founded his judgment upon the authority given by the settlor, to invest it with themselves and held that the knowledge of Messrs. Arbuthnot & Co. that the amounts were trust moneys made no difference. He pointed out that the general duties of trustees as to the investment of trust moneys were subject to the first and foremost duty of a trustee to carry out the direction of the creator of the trust and said "if the settlor chooses to make it a term of the settlement that the moneys should be lent to the trustees themselves hoping

21. (1894) 2 Q. B. 237.

to get a profitable return, then it is the misfortune of the beneficiaries if the trustees become bankrupt, and they must be content to rank as ordinary creditor." It is significant that both Munro and Abdur Rahim JJ. relied upon the agreement to pay interest on the trust moneys as indicating the negation of a relationship of a fiduciary character and the creation of one of banker and customer.

Yet another case in the same volume is *Official Assignee of Madras* v. *Rajam Aiyar*,[26] which went on appeal in I. L. R. 36 Mad. 499, the ultimate decision being that the claimant's application for preferential payment should be allowed. The only question argued was, whether Messrs. Arbuthnot & Co. held the amounts in a fiduciary capacity or as bankers. Abdur Rahim J. emphasised the view he had taken in *Official Assignee of Madras* v. *Oriental Government Security Life Assurance Co.*,[27] that as the claimant was not a customer but a stranger to the bank, the general rule applicable to remittances by customers was inapplicable and that the bank held the amount as bailee. He also dissented in terms from *Official Assignee of Madras* v. *Smith*.[24] The Editor of the Indian Law Reports adds a note that the decision of Abdur Rahim J. was affirmed on Letters Patent Appeal.

It is significant that in none of the cases had the Court to consider the question whether tracing was possible against the ultimate assets of a trustee, without any proof of the identity of the original trust funds in the ultimate assets. Such a point does not appear to have been raised. In truth none of these cases viewed the facts in the proper angle as one for the application of the principles of strict tracing. They may illustrate one of the principles in the law of tracing, but they did not, one fears, realise the full scope of the doctrine, its implications and limits, and seek deliberately to apply it. No doubt they refer to In re *Hallett's Estate*[12] and other cases on the subject, but being cases which arose in Insolvency, they were more at a consideration of the "order and disposition" clause, and the question of "reputed ownership," than at defining the strict limits of tracing. They were at pains to decide simply whether the relationship was one of trustee and *cestui que trust*, or that of debtor and creditor, and no more. The unfamiliarity in this country with Administration actions is partly responsible for

12. (1880) 13 Ch. D. 696.
24. (1908) I. L. R. 32 M. 68.
26. (1909) I. L. R. 33 M. 299.
27. (1909) I. L. R. 33 M. 150.

a late recognition of the principles of tracing and an attempt to apply them.

The first decision that recognised the position in clear perspective is that of Sadasiva Aiyar and Napier JJ. in *Mulrasu Lakshmi* v. *Official Assignee of Madras.*[31] It contains a clear exposition of the law on this subject, and is very instructive, and its non-appearance in any of the other reports does not detract from its value as an authoritative contribution to this branch of the law. In this case, the claimant entrusted to a jeweller sovereigns and gold to make into a jewel. The latter converted them into cash (which got mixed with his own funds) and became bankrupt. There was no evidence that the sovereigns and gold, or their value, must have been included in the final available assets. The claim was made for preferential payment, which the Court refused, the appellate Judges concurring with the trial Judge, Bakewell J., in the matter. Both the appellate Judges, in separate judgments deal with the law of tracing as laid down in the long series of English decisions ending with *Sinclair* v. *Brougham,*[20] and if one may say so with respect, they are clear and accurate expositions of the law. After stating that the decisions laid down the necessity for proof of continued identity, Sadasiva Aiyar J. says, "If in this case, I could have found my way to decide that the assets taken possession of by the Receiver or by the Official Assignee, did include, or must have included, the gold or the value of the gold contained in the sovereigns and the bar given by the petitioner to the insolvent, or that, though the petitioner's particular gold was misappropriated by the insolvent, he made *oddiyanams* or *mettus* with other gold (as in the case in *Harris* v. *Truman*[23]) *in order to fulfil his obligations to the petitioner* I would be inclined to apply the doctrine of tracing and the doctrine of quasi-charge even to the full limits indicated by Lord Dunedin in his judgment in the recent House of Lords case; but I do not see my way to differ from the finding . . . that the petitioner has failed to show that the gold or the price of that gold was invested in or formed part of any of the assets taken possession of by the Receiver or by the Official Assignee and I must therefore confirm the order . . . that the petitioner must be treated as a man who had lost the gold entrusted by him to the insolvent just as if the insolvent had converted it into cash and squandered it in

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20. (1914) A. C. 398. 23. (1881) 7 Q. B. D. 340.
31. (1915) 29 I. C. 37.

unknown ways before his insolvency." In an earlier part of his judgment, the learned Judge states, "the burden of proof (the burden of proving identity, on the part of the applicant) may be discharged by a sort of eliminating process, *i.e.*, *A* (the applicant) might establish that the remaining securities, investments and assets in the possession or name of *B* (the trustee) ***must*** be the result of the use of *A's* funds." It is also significant that the learned Judge realises that the doctrine is taken to its maximum length at the limits indicated by Lord Dunedin in his judgment in *Sinclair* v. *Brougham*,[20] where he speaks of the existence of a proved superfluity unaccounted for save by reception of the original trust fund—an illustration of the indirect mode of proof of identity. Napier J. adds, "It is obvious that if the claim is ***in rem*** the *res* must be ascertained," and it is submitted that this one short sentence states the whole law of tracing.

Next in its turn is the case of *Krishnaji Bhat* v. *Sadasiva Tawker*,[32] on appeal, *Official Assignee of Madras* v. *Krishnaji Bhat*. The decision in the trial Court was that of Kumaraswami Sastri J. and it was affirmed on appeal, though on different grounds, by Reilly and Cornish JJ. In that case the father of the claimant Krishnaji Bhat, had handed a sum of Rs. 10,000 to Sadasiva Tawker of Messrs. Tawker & Sons, on which he subsequently engrafted by letter a trust in favour of his son, requiring at the same time that the trustee should invest the amount with himself and pay the interest thereon to the beneficiary. The suit as originally laid was by the claimant to remove the trustee on the ground that he was in insolvent circumstances and had committed a breach of trust in not carrying out the directions of the settlor, for appointment of a fresh trustee, and for directions to hand over to such new trustee the trust fund. Pending the suit, the trustee became bankrupt, and the Official Assignee was brought on record. The suit was then conducted on the footing of a claim for tracing against assets in the hands of the Official Assignee which consisted of the proceeds of sale of the showroom jewels of Messrs. Tawker & Sons. It was sought to be proved for the plaintiff that the original trust fund of Rs. 10,000 was in fact invested in the purchase of showroom articles, which by sale and re-purchase over and over again was in the shape of the showroom articles as they stood at the date of the insolvency, and thus the attempt was made

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20. (1914) A. C. 398.

32. (1926) 24 L. W. 869. 33. (1929) 59 M. L. J. 718.

to trace directly by evidence the original trust fund to the ultimate assets in the hands of the Official Assignee which were the proceeds of the showroom articles. The learned Judge, Kumaraswami Sastri J., in the first instance, held that there was in the Official Assignee's hands the proceeds of a larger stock of goods, part of which were the goods so purchased from the trust fund and that therefore the plaintiff had a charge on the funds with the Official Assignee. It should be mentioned that the allegation of breach of trust was not sought to be substantiated before the Court, and the learned Judge stated that the evidence established that "acting on the permission of the author of the trust when the trust was created," the trust money was used for the purchase of goods.

In the Appellate Court, the learned Judges found that the identity of the trust money with the cash proceeds in the court, through the series of transmutations as alleged, was not made out, and that there was no breach of trust on the part of the trustee in utilising the trust money as if it were his own; but held that, notwithstanding these findings, the admitted investment of the trust fund in the business entitled the beneficiary to be paid preferentially from out of its assets.

The matter is now *sub judice*, pending appeal to His Majesty in Council, and among the points raised there, are the following.—

(I) The authority given by the settlor to the trustee to invest it with himself made the relation between the trustee and beneficiary one of debtor and creditor, the trust thereupon being of the debt and not of the money.

(II) The money representing the trust fund was, at the date of insolvency, in the order and disposition of the insolvent within the meaning of S 52 (*c*) of the Presidency Towns Insolvency Act.

(III) The settlor having previous to the creation of the trust handed the money to the would-be trustee who was thereby in debt to the settlor for the amount, the subsequent creation of the trust can only be in respect of that debt, with the consequence that if the debt dwindled the trust suffered to that extent; and

(IV) In any event, the ultimate assets not having been found to include the trust moneys or any portion of them, there could be no order for tracing against such assets.

The judgment of the Judicial Committee is awaited, and in the circumstances, the grounds of decision of the Appellate Court, Reilly and Cornish JJ., are not canvassed here.

Next comes the decision in *Official Assignee of Madras* v. *Devakottah Nagarathar Sri Minakshi Vidyasalai Paripalana Sangam.*[34] This was a decision on an appeal from the judgment of Waller J., which is quoted in the corresponding report in 57 M.L.J. 99. In that case, a Nattukkottai Chetti, banker and money-lender, was the treasurer of a school and one of its trustees. He collected various amounts of subscription for the school, and paid them all in into his own bank, into an account marked with the name of the school, and utilised them in his business, it is found, without the knowledge or consent of his co-trustees. He subsequently became insolvent; on which date the accounts showed a sum of Rs. 40,000 to the credit of the school. The co-trustees, on proof of this single fact, sought preferential payment of the amount from the realised general assets of the banking concern of the insolvent which came into the hands of the Official Assignee. Waller J., in the first instance, relied on S. 66 of the Indian Trusts Act as sufficient to dispose of the claim in favour of the claimant. He understood "the fund" referred to in the section, to be represented by the ultimate assets, and negatived the argument in favour of the necessity for continued identity of the trust fund.

On appeal, it is worthy of note that the learned Chief Justice, Coutts Trotter C.J., expressed his own diffidence in dealing with the question and the hope that the matter could be taken on appeal to the higher tribunal. This hope, however, was in vain as the matter was settled subsequent to judgment.

In dealing with the question, the learned Chief Justice states the several propositions established by English decisions in their order, beginning with the abrogation of the doctrine of the impossibility of tracing money adumbrated in early decisions, and ending with the case of a proved mixture of trust-funds with other moneys, out of which lands or goods might have been purchased. Then he states the question before him in this form:—"Then arises the case where the trust-moneys have not only been mixed with the trustee's moneys, but where there is no tangible asset which could be alleged to have been acquired with the trust funds, wholly, or partially," and states the finding of fact to be that "the business was so unsuccessful that the actual funds in the hands of the Official Assignee as at this

34. (1929) I. L. R. 52 M. 919.

date realised, amount to nothing," as compared with the original assets put into business. The learned Chief Justice then looks at the converse of the proposition submitted to him on behalf of the Official Assignee, and says, "that argument ultimately seems to me to imply that a trustee has only to put trust-moneys into business and then and there the *cestui que trust* is debarred from invoking the equitable doctrine, and sinks to the position of an unsecured and unpreferred creditor of the estate," and added that that view was negatived by Turner L.J. in *Pennell* v. *Deffell*[13] in the illustration he therein gave. The learned Chief Justice overlooked the fact that as against the trustee who misappropriated the money, the *cestui que trust* had, to start with, no higher right than that of a simple creditor.

The other learned Judge, Anantakrishna Aiyar J., makes a fuller citation of authorities, and states the law correctly, it is submitted with respect, up to the stage when he begins to consider the question directly involved in the case before him. With reference to that question, he simply says, "I am not clear why the doctrine should not apply when the trustee instead of utilising the trust-money for the purchase of property, utilised it in a trade or business of his own." Herein the learned Judge contemplates a situation which, it is submitted with respect, makes the whole case different and thereby entirely misses the basic principles of the law of tracing. The learned Judge refers to Turner L.J.'s illustration and adds one of his own, *viz.*, the rights to the ultimate assets of the purchaser of a going concern. The illustration of Turner L.J. has already been explained consistently with the principles of tracing, apart from the fact that, as Turner L.J. himself doubted, the principle of that illustration is properly a rule of partnership law which, as Lord Hatherley pointed out in *Lord Provost etc. of Edinburgh* v. *Lord Advocate*,[14] was the creature of slow evolution. The illustration newly added by Anantakrishna Aiyar J. is equally answered by saying that the purchaser of the concern purchased every item of the assets then in existence and had a title to each and every one of them, and it is these separate items of asset that through various transmutations stood in the form of the ultimate assets, into each of which must have been included one or other, or part thereof, of the original assets.

At the end of his judgment, Anantakrishna Aiyar J. refers to the case of *Mulrasu Lakshmi* v. *Official Assignee of Madras*[31]

13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.

14. (1879) 4 A. C. 823.

31. (1915) 29 I. C. 37.

and quotes *in extenso* from the judgment of Sadasiva Aiyar J. and winds up saying "The principle would seem to be that a wrong-doer cannot be permitted to take advantage of his own wrong, and that no wrongful act of the trustee could prejudice the rights of the beneficiaries in cases like the present." With great respect, while the proposition referred to by the learned Judge and stated in general terms, is undoubtedly sound, it has no application to extend the scope of the law of tracing, which stands defined by other principles. It is not a fundamental or a basic principle of 'tracing'. It merely aids in working out the result, where a proper case for tracing is otherwise made out Its application is limited to a case of a proved mixture of trust-funds with private funds, to prevent the trustee from laying any claims of his own to the "single sum" constituted by the mixture, before the beneficiaries have their claims satisfied thereout. To this extent a trustee in wrong cannot gain advantage by it (see *Sinclair* v. *Brougham*[20]). If the proposition laid down by the learned Judge were as broad and far-reaching in its consequences as the conclusion he derived therefrom is, the decision in *Mulrasu Lakshmi* v. *Official Assignee of Madras*[21] itself must be different, for there can be no special distinction in the case of the merger of the trust-fund in a business. In fact, Napier J. in that case negatived that very position, when he said, "It was contended before us that the appellant could recover as a preferential creditor on the principle that if the estate had been benefited by the transaction the value of the specific moveable can be recovered. It is sufficient to say that there is no authority for this broad proposition."

On this aspect, reference may also be made to proposition No. 3 in the arguments of Upjohn K. C. in *Sinclair* v. *Brougham*,[20] relied on by Sadasiva Aiyar J. in his judgment, *viz.*, that "the burden of proving the identity is on the person alleging it"; a statement which cannot be correct if the beneficiary need only prove a breach of trust and his own loss thereby. To hold that in all cases where a trustee misappropriates a trust-fund his act attracts the consequence that the beneficiary becomes thereby and forthwith a creditor of a higher nature to the extent that the entire assets of the trustee stand charged for the repayment of the misappropriated amount, is to innovate, by converting what according to the established doctrines of law is a simple debt owing by the trustee to the beneficiary, into a debt

20. (1914) A. C. 398 at 406, 422, 424 31. (1915) 29 I. C. 37.

of a higher nature, as if it stood charged on the trustee's estate, in other words, to confound a right *in personam* with a right *in rem*. A passage in Lewin succinctly expresses the law in such cases, and it is submitted, correctly: "If the property possessed by the bankrupt in his character of a trustee has become so amalgamated with his general property that it can no longer be identified, the representative of the trust has then no other remedy but to come in as a general creditor and prove for the amount of the loss" (Lewin: Law of Trusts, 12th Edn., pp. 270 and 271).

The next and last case to be considered is that of *Nagappa Chettiar* v. *Official Assignee of Madras*.[35] The decision in the first Court was that of Waller J. who refused to make a tracing order and that judgment was affirmed by Curgenven and Bhashyam Ayyangar JJ. though on different grounds. The facts were that two members of a Nattukkottai Chetti family, one of whom subsequently became insolvent, agreed, on the occasion of a partition between them, to set apart funds for a charity. Both of them were bankers and the insolvent was then in very affluent circumstances. The other member, the applicant before the Court, drew for his share of the contribution, a hundi upon a firm of bankers known as O. R. M. O. M. S. P. in favour of the insolvent, the other member. The insolvent kept the money for a number of years for interest with the banker O. R. M. O. M. S. P. himself in the name of the charity. Some time later he transferred the deposit with that firm to his own firm at a time when there could be no question about his solvency. This transfer was effected by setting off in the books, the amount to the credit of the charity with O. R. M. O. M. S. P. towards a debt owing then by the insolvent to the said O. R. M. O. M. S. P. Corresponding entries were made in the books of the insolvent, the latter debiting himself and crediting the charity with a like amount. Some years thereafter the insolvency happened, and the applicant, the other member of the family, claimed as a co-trustee of the family-charity, to trace for the amount standing in the books of the insolvent to the credit of the charity. It was also the fact that the assets in the Official Assignee's hands against which the tracing order was sought, consisted of two sums, a sum of Rs. 5,000 not derived from the business in which the trust-moneys were invested, and another sum of Rs. 40,000 received by way of refund of income-tax in respect of a tax paid by the insolvent at a time when the charity money stood invested with O. R. M. O. M. S. P.

35 (1929) 53 M L J 36; on appeal 60 M. L. J 355

On these facts, Waller J. in the first instance refused a tracing order on the ground that the decision in In re *Hallett & Co.*, Ex parte *Blane*[21] directly applied. The learned Judge quoted the words of Esher M. R. "All that can be shown is a settlement of account, and a settlement of account cannot be followed", and said "I cannot think that a book-adjustment of this kind can be treated as a passing of money into the hands of the trustee". The learned Judge also held that the trust-money had not in any possible view got mingled with the assets in court, which cannot therefore be "treated as trust property, or as anything but the trustees' own property". It is submitted with respect that the judgment is certainly well founded on these two grounds. The learned Judge, however, negatived another argument urged on behalf of the Official Assignee against the possibility of a tracing order, and that deserves to be mentioned.

It was common ground that the insolvent had to pay interest on the charity amount at the *nadappu* rate, and upon that fact the argument was advanced that the relationship of debtor and creditor was created and that the act of the insolvent in utilising the charity amounts in his own business as if they were his own and mixing them with his own moneys, was legitimate and not wrongful, as he was authorised to invest them in his own business. The learned Judge negatived this argument, relying on the judgment of Kumaraswami Sastri J. in *Krishnaji Bhat* v. *Sadasiva Tawker.*[32] Though this latter case is, as stated already, pending final decision before the Judicial Committee, it may be permissible to say a word on the matter, upon Justice Waller's judgment.

It seems to follow that once it is conceded that the trustee is under an obligation to pay interest and that at the *nadappu* rate by agreement, enough has been conceded to make the remedy of a tracing order inapplicable. The undertaking by the trustee of the obligation to pay interest, necessarily connotes the consideration therefor in the liberty the trustee would enjoy to put the money to use; and if the money is so authorised to be used by the trustee, the title to the money becomes his, displacing the title of the beneficiary, whose title thereafter would attach to the debt.

In this connection the individual observations of Munro and Abdur Rahim JJ. in *Official Assignee of Madras* v.

21. (1894) 2 Q. B. 237. 32. (1926) 24 L. W. 869.

Krishnaswami Naidu[30] referring to the implications of the obligation to pay interest, on the part of the trustee on trust-funds, are relevant.

In the Appellate Court, both the learned Judges, it is submitted, rightly agreed to differ from Waller J. on the point last mentioned, on which Waller J. negatived the argument for the Official Assignee. Curgenven J. said at page 359, "I find it very hard to see how, when trust money is handed over to any person, he be or he be not a trustee, to use in his business, and subject to the payment of interest, no relationship of creditor or debtor is set up. The circumstances that he may use the money as his own, and that he has to pay interest, seem to me to point clearly to the engrafting of a contract upon the trust, whereby title to the money is transferred, and the trust no longer can look to that particular sum of money, as its *res* or subject-matter, but to a promise to pay an equal sum". On the same question Bhashyam Ayyangar J. dissented in terms from *Official Assignce of Madras* v. *Krishnaji Bhat*[33] and expressed his concurrence with *Official Assignee of Madras* v. *Krishnaswami Naidu.*[30]

They further affirmed the judgment of Waller J. on the ground that the assets before the court did not in fact include any portions of the trust money.

Yet, on two other points that were argued in the case, the learned Judges made observations (on one of the points against the view taken by Waller J.), and these deserve consideration. The first of them is with reference to the right to trace to the realised general assets without the beneficiary undertaking the proof of the inclusion of trust-funds in those assets. Upon this matter, Curgenven J. first referred to *Pennell* v. *Deffell,*[13] and said, "There was clear observance in this case of the principle that the presence of a definite sum of trust-money in the account, must be ascertained before it can be claimed". Then he referred to In re *Hallett's Estate, Knatchbull* v. *Hallett*[12] and observed, "the original subject-matter of the trust may be traced into what other form different from the original it may have passed; the right only ceases when the means of ascertainment fail". Then he cited *Sinclair* v. *Brougham,*[20] and said, "If this distinction between a right *in personam* and a right *in rem* is kept clearly in view, it affords, I think, index to the necessary

12 (1880) 13 Ch. D. 696.
13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.
20. (1914) A. C. 398. 30. (1909) I. L. R. 33 M. 154.
33. (1929) 59 M. L. J. 718.

limits of the doctrine of tracing". Then the learned Judge referred to the appellant's contention before him, which was to the effect, that all that he need show was that at some time the trust-fund went into the assets of the business, in order to give him a first claim for the whole amount upon any subsisting assets, and proceeded to say, "for this purpose we must regard the trade assets, he says, as a single entity, with an identity enduring throughout every phase and transformation, and taking its latest form in the sums now in the Official Assignee's hands. Now an assumption of this kind is to be found in two cases of this court, *Official Assignee of Madras* v. *Minakshi Vidyasala Sangam*[34] decided by Coutts Trotter C.J. and Anantakrishna Aiyar J. and the already cited case, *The Official Assignee of Madras* v. *Krishnaji Bhat.*[33] I think, it is clear from the English cases cited before us and which I have made some attempt to abstract, that this would take the theory of tracing a good deal further than any actual English decision would warrant, and in fact in both instances reliance was placed not upon an actual decision, but upon an illustration employed by Turner L. J. in *Pennell* v. *Deffell,*[13] the case of an executor of a deceased partner leaving the latter's capital with the surviving partners to trade with, and the persisting identity of the partnership-share through all its fluctuations. Whether or not this would afford a valid parallel to such a process of tracing . . ." Having gone thus far, the learned Judge refrained from answering the question which he said was not easy to answer, and solved the point for decision with reference to the facts which the case before him presented. Stating that it may not be "stretching it too far to adopt as a general presumption, the position, whether you can prove it by evidence or not, that trust-money put into a business is traceable to the eventual assets", he said that the presumption must be rebuttable, and that it was rebutted in the case before him inasmuch as the assets before the Court were shown not to include any portion of the trust-fund. We may leave the learned Judge's judgment of justified disinclination at that, and await another opportunity when the direct question may present itself for decision, untrammelled by any other facts or circumstances, as it was in the case under review.

The other point which was indirectly dealt with by Curgenven J. but dealt with directly by Bhashyam Ayyangar J.

13. (1853) 4 De G. M. & G. 372: 43 E. R 551.
33. (1929) 59 M. L. J. 718. 34. (1929) I. L. R. 52 M 919.

is the applicability of the decision in In re *Hallett & Co.*, Ex parte *Blane*.[21] Bhashyam Ayyangar J. distinguished this case on the ground that the book-adjustment therein was between Hallett & Co. and Hewitt & Co. and not with Cocks Biddulph & Co., the moneys with whom were the assets before the court; and Curgenven J. also observed, "I think that, if the facts of Ex parte *Blane*[21] are closely considered, it will be seen that Lord Esher's dictum that 'a settlement of account cannot be followed' must be read in the light of the special circumstances, and that the case is really only an exemplification of the necessity—clearly stated by Lords Justices Lopes and Davey—of being able to follow certain specific property. It was clear in that case that the trust money never came into the hands of the defaulters' bankers, but reached another destination by means of the settlement of account referred to". This no doubt was a ground of decision. But that was not the only ground. It deals with the last stage of the "quest," but it is respectfully submitted that Waller J. was right when he understood this decision as showing that the "quest" failed at the very first stage. As the result of the adjustment between Hewitt & Co. and Hallett & Co. there was no *res* to begin with, to enable a tracing. Esher M. R. says, "Can Col. Blane . . . show that Hallett & Co. did actually receive the money . . . ? Hallett & Co. did not in truth receive any money; they entered into a transaction with Hewitt & Co., the result of which was that no money passed; although in one sense Hewitt & Co. put Hallett & Co. in the position of being unable to say to Col. Blane that they had not received the money, yet Hallett & Co. did not in fact receive any moneys, or tender of money, or anything tangible, which it would be possible to follow or to lay hands upon. Had there been anything in existence representing that which the bankers were authorised to collect, Col. Blane might have followed it; but he cannot show that; he can only show a transaction between Hallett & Co. and other persons. All that can be shown is a settlement of account, and a settlement of account cannot be followed". Davey L. J. says: "I have no doubt that for the purpose of making them the debtors of Capt. Blane's trustees, this money was received by Messrs. Hallett & Co.; but it was not received by them in any sense which is material to the present purpose. Nothing was received by them *in specie*, notes, cheques, or coins; there was no credit existing *in specie*, nothing which the

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21. (1894) 2 Q. B. 237.

cestui que trust could follow and say that the property had been converted into". The obvious distinction that is drawn is that while an obligation *in personam* was created by the transaction no right *in rem* arose, enforceable by a tracing order.

Bhashyam Ayyangar J. in his judgment says that the state of the accounts did not absolutely negative the idea of the passing of cash between the insolvent and O. R. M. O. M. S. P. But the answer is that this does not matter in the result. If the state of the accounts shows that O. R. M. O. M. S. P. brought cash to the insolvent to pay the charity fund, the same accounts show that the insolvent forthwith took that cash back to O. R. M. O. M. S. P. and discharged therewith his own debt to them. In this aspect of the facts, the amount of trust-fund was dissipated by the trustee and therefore no longer formed part of his assets *in specie*. His net assets might have increased by the discharge of his debt to O. R. M. O. M. S. P. but that is not, in any sense, "material to the present purpose". A similar argument was negatived in Ex parte *Blane*.[21]

According to Waller J. tracing failed at the initial stage; according to the appellate Court, it failed at the final stage; according to the view above presented, it failed at the intermediate stage.

SUMMARY OF ENGLISH CASES.

M'ALISTER (OR DONOGHUE) *v.* STEVENSON, (1932) A. C. 562.

Negligence—Liability of manufacturer of ginger-beer to consumer—Snail in bottle—Health of consumer injured—Liability of manufacturer

A manufacturer of ginger-beer sold his ginger-beer in bottles of dark opaque glass. The appellant bought a bottle of ginger-beer from a retail seller at Paisley, drank some of it but before consuming more found that a decomposed snail was in the bottle. The manufacturer had filled the bottle without noticing the snail. In consequence of having consumed some portion of it, the appellant suffered from shock and severe gastro-enteritis. In an action against the manufacturer for damages for negligence,

Held, by the majority of the House of Lords, Lord Atkin, Lord Thankerton and Lord Macmillan (Lord Buckmaster and Lord Tomlin dissenting) that as the manufacturer sent out his goods in

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21. (1894) 2 Q. B. 237.

an opaque container as not to be open to intermediate inspection by the distributor or retailer, a proximate relationship resulted between the consumer and the manufacturer, and a legal duty arose on the part of the manufacturer to the consumer to take reasonable care that the article was free from defect likely to cause injury to health.

HOLDER *v.* COMMISSIONERS OF INLAND REVENUE, (1932) A. C. 624.

Income-tax—Income-tax Act, 1918, S. 36—Interest payable on an advance from a bank—Guarantor of the advance paying it up—If guarantor entitled to deduction of income-tax.

The appellants were interested in a company which had for many years been indebted to its bankers. The appellants guaranteed the advances to the company by the bank and finally paid the bank the amounts due under the advances, of which a large sum represented the interest due on those advances. The appellants then claimed repayment of the tax on the amount of interest under S. 36. S. 36 says that " where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest."

Held, that interest payable on an advance from a bank means interest on an advance made to the person paying. The guarantor does not pay on an advance made to him, but pays under his guarantee. In paying the amount of the indemnity, the guarantor cannot be said to be paying interest to the creditor, though he is making good the loss of interest. S. 36 only relates to the person who has obtained the advances, and not to a guarantee, who in paying the amount of interest, does not pay interest to the bank within the meaning of the section.

WINNIPEG ELECTRIC COMPANY *v.* JACOB GEEL, (1932) A. C. 690.

Negligence—Canada (Manitoba Motor Vehicle Act), S. 62—Motor accident—Onus of proof—Evidence all on defendant's side—Judge, if can withdraw the case from jury.

W, the respondent, was sitting in the rear seat of an open touring car which was held up for a moment at a street-crossing by traffic signals. While so stationary, the car was heavily run into

from behind by the appellant's motor omnibus. *W* sustained serious injuries. In an action for damages, the defendant let in evidence on the issue of negligence which the defendant contended was all one way and preponderating and that the Judge ought to have withdrawn the issue from the jury.

Held, that under S. 62 " when any loss, damage or injury is caused to any person by a motor vehicle the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle, and that the same had not been operated at a rate of speed greater than was reasonable and proper having regard to the traffic and use of the highway or place where the accident happened, or so as to endanger or be likely to endanger the . . . . . . , shall be upon the owner or driver of the motor vehicle." Apart from the section, a plaintiff claiming damages for personal injury in a running down case would have to prove (*i*) that he was injured, (*ii*) that his injury was due to the defendants' fault, and (*iii*) the fact and extent of his loss and damage. In virtue of this statute, he need only establish the first and third elements. The onus for the second is on the defendant, which cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent. The Judge could not have withdrawn the case from the jury because the plaintiff tendered no evidence of negligence; and notwithstanding one-sided evidence, the jury had to decide the issue.

Stanley v. *National Fruit Co.*, (1929) 24 Sasket L. R. 137, approved.

Carnat v. *Mathews*, (1921) 16 Alberta L.R. 275, not approved.

In re HORNE'S SETTLEMENT: COUTTS AND COMPANY *v.* DUCHESSA DUSMET DE SMOURS, (1932) 2 Ch. 180.

Bankruptcy—Settlement—Divorce—Covenant by husband to pay an annuity to the wife in lieu of alimony—Restraint upon anticipation during coverture—Dividend payable—Arrears of annuity—If can be paid to the wife.

By a settlement deed, dated 1st July, 1925, the husband covenanted with his first wife to pay her during their joint lives an annuity of 3000*l.* per year for her separate use without power of anticipation during her coverture. This was on dissolution of her marriage with the husband. In 1929 the husband became a bankrupt and the trustees under the settlement proved in the bankruptcy for the capitalised value of the annuity. The proof was admitted and

2333*l.* was declared as the dividend payable to the wife, treating her as a creditor of the estate. There was due for arrears of annuity 1043*l.*

Held, that the annuitant as the creditor of the bankrupt covenantor was the only person entitled beneficially to the dividend. To the extent of the arrears, it would be part of her estate. The restraint on anticipation or alienation might attach to any excess of the dividend over the arrears for the time being due to the annuitant, but, inasmuch as there were already arrears to an amount greatly in excess of the moneys in the hands of the plaintiffs, there was no ground for retaining any part of the 1043*l.* and it must be paid to the wife.

In re *Bown,* (1884) 27 Ch. D. 411, followed.

In re NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED, (1932) 2 Ch. 184.

Estoppel by representation—Insurance Company—Reinsurance policy—Indorsement of guarantee by another company printed on top of policy—Both companies represented by same chairman, managing director, and underwriter—No evidence of formal contract of guarantee—If can plead absence of contract.

In 1921 and 1922 N. M. Company, issued to the London Company seven marine reinsurance policies, upon each of which a claim for loss or damages arose. In winding up of N. M. Co., a small dividend was paid thereon. On top of each policy was an indorsement printed in red to the effect that " the due fulfilment of the liabilities arising under this policy is guaranteed by the N. B. Co " There was no evidence of any guarantee of any policies of N. M. having been given by N. B. But the N. B. Co. held a large majority of shares in N. M. Both had the same chairman, same managing director, and the same underwriter. The London Company filed a claim in the winding of N. B. Co., for the balance due.

Held, that in the circumstances N. B. Co., was estopped from asserting that the liabilities were not in fact guaranteed by it. It was well known to all the directors of N. B. that their company was guaranteeing the marine risks of the N. M.

Greenwood v. *Martins Bank,* 45 Times L. R. 607; 1932 W. N. 178, applied.

In re SCIENTIFIC POULTRY BREEDERS' ASSOCIATION, LIMITED, (1932) 2 Ch. 212.

Company—Limited by guarantee—Promoted for encouraging and improving scientific methods of breeding, etc., poultry—Memo-

randum prohibiting payment of remuneration to members of Governing Body—Increase of business—Special resolution to remunerate Governing Body—Jurisdiction to sanction—Companies Act, 1929, Ss. 4, 5.

An association was registered as a company limited by guarantee with the primary object of encouraging and improving the breeding of poultry and promoting the use of better and more scientific methods of breeding, feeding and housing poultry. The memorandum and articles of association prohibited the payment of any remuneration to or the division of any profits among the members of the Governing Body. The business of the company increased and consequently the duties of the Governing Body and the company therefore passed a special resolution altering the memorandum by permitting remuneration of members of the Association and of the council or governing Body of the Association for work done for the Association and an application was taken out to confirm it by the Court under S. 5 of the Companies Act, 1929.

Held, that under S. 5, a company may with the confirmation of the Court, by special resolution, alter the provisions of its memorandum with respect to the *objects* of the company so far as may be required to carry on its business more efficiently. But the alteration sought to be confirmed operates clearly to destroy certain of the essential attributes of the company and to make alterations which are not alterations in respect of the *objects*, but alterations going to the real *constitution* and the fundamental objects of the society.

In re *Society for Promoting Employment of Women,* 1927 W. N. 145, applied.

Incorporated Glasgow Dental Hospital v. *Lord Advocate,* 1927 S. C. 400, distinguished.

In re LADD. HENDERSON *v.* PORTER, (1932) 2 Ch. 219.

Construction—Will—Appointment by will to husband—"To the intent that this my will shall take effect whether I survive or predecease my husband"—Husband predeceasing wife—Whether the appointment survives to husband's executors or lapses.

When the husband was alive and she had no children, a wife, who was of illegitimate birth, made a will exercising the power of appointment she had under the marriage settlement, in favour of her husband. The will did not contain any residuary clause or deal with any property other than that comprised in the settlement. The will added the clause " and to the intent that this my will shall take effect whether I survive or predecease my husband". The husband predeceased her and the wife died without revoking this will.

Held, that the husband, the donee of the appointment by will having died, the appointment would normally be ineffective, unless there be in the will a clear intention that it shall not lapse and pointed out to whom the gift is to go in the event of the donee's death. Such person may be a stranger or even the appointee's executors or administrators. The words "to the intent that this my will shall take effect, whether I survive or predecease my husband" were not enough to spell out an effective intention that her husband's estate should take the benefit of the bequest in case he were to predecease her. The appointment, therefore, lapsed and did not take effect.

In re WITHALL. WITHALL *v.* COBB, (1932) 2 Ch. 236.

Will—Charitable bequest to Margate Cottage Hospital—Change of Site and name of the Hospital to the knowledge of testatrix—If bequest of the new hospital.

By her will, dated 22nd September, 1924, a testatrix directed her executors to sell the residue of her property and to pay the proceeds to the Margate Cottage Hospital then in existence.

In 1926 funds were collected and the hospital was removed to another place and enlarged and came to be called " Margate and District General Hospital ". To it was transferred the work of the old hospital, including the medical and nursing staff and the patients. All the investments held by trustees for the Margate Cottage Hospital and the income therefrom were treated by the same trustees as applicable for the new hospital. The testatrix did not change the name of the hospital in the bequest.

Held, it was a valid charitable bequest. The testatrix intended that her residue should be added to the funds dedicated to the purposes of the Margate Cottage Hospital. That means that it should be paid to the persons administering the trusts to which the funds of the Margate Cottage Hospital are dedicated as an accretion to those funds. Question whether the new hospital was identical with the old and entitled to take the bequest left open.

TWYNHAM *v.* BADCOCK, (1932) 2 K. B. 549.

Food and Drugs (Adulteration) Act, 1928—Adulteration by addition of preservatives—Conviction of retail seller after observing the formalities under S. 18—Samples taken and tested from retailer—Prosecution of retailers seller—No fresh samples taken from him—Validity of charge—Public Health (Preservatives, etc., in Food) Regulations, 1925, Art. 7.

A retail seller of ground ginger was charged and convicted for sale of ground ginger adulterated by added preservatives. Before

his prosecution, the Inspector under the Sale of Food and Drugs Acts went through the formalities under S. 18 of the Act, namely, taking of samples from the retailer, dividing them into three parts, delivering one of them to the retailer, then chemically examining the sample to detect the adulteration After the retailer's conviction, the Inspector commenced proceedings against the previous seller under the Public Health (Preservatives, etc., in Food) Regulations, 1925, Art. 7, for selling contrary to the provisions of the Regulations, but did not take any samples again from him or repeat the process. On an objection that the charge was bad for non-observance of the formalities under S. 18 of 1928 Act,

Held, that the regulations do not contemplate that there should be two processes of taking samples, division of the samples and analysis of the samples. They contemplate only that there should be one such process. The case is similar to one where warranty has been relied upon under the Act of 1928 by the retailer.

WEDDELL AND ANOTHER *v.* ROAD TRANSPORT AND GENERAL INSURANCE CO., LTD, (1932) 2 K. B. 563.

Insurance (Motor-car)—Exemption from liability when risk covered by another policy—Meaning of.

The claimant J. R. W. held a motor-car policy issued by the respondents; R. Co., an insurance company, which by Sec. II (A) provided that the company will at the request of the insured treat as though he were the insured any relative or friend of the insured whilst driving such motor-car provided that such relative or friend is not entitled to indemnity under any other policy. The policy further provided that if at the time any claim arises under it, there is any other existing insurance covering the same loss, damage or liability, the company shall not be liable to pay or contribute more than its rateable proportion of the liability. The claimant's brother L. W. W., while driving the car, injured a third party.

L. W. W. also owned a car, in respect of which he held a policy of another insurance company (C. Co.) which contained the following clause:—"*Section L: driving other cars.* The indemnity granted under Section A herein is hereby extended to cover the insured whilst driving any private motor-car not belonging to him for pleasure or professional purposes it no indemnity is afforded the insured by any other insurance". This policy contained no rateable proportion clause. In an action by J. R. W. on his policy, the company pleaded that they were liable only rateably as L. W. W. was insured and had a co-existing cover from his own policy.

Held, that the reasonable construction of the policies was to exclude from the category of co-existing cover any cover which is

expressed to be itself cancelled by such co-existence. To hold otherwise would be to cancel each other, with the result that the loss will be covered nowhere. The correct view will be to hold that the relative or friend is not "entitled to indemnity under any other policy" within the meaning of R. policy, and not 'afforded' indemnity "by any other insurance" within the meaning of the C. policy.

DAMPSKIBSSELSKABET BOTNIA A/S *v.* C.P. BELL AND COMPANY, (1932) 2 K. B. 569.

Shipping—Charterparty—"Weather working day"—Meaning of—Work prevented by ice—If weather working day.

By a charterparty, it was provided that the Steamship *Syndhavet*, belonging to the plaintiffs, should proceed to a port in Finland and there load from the agents of the charterers a full and complete cargo of pit-props at a specified rate of 125 fathoms "per weather working day". On certain days loading could not be done owing to ice. In an action foı dead freight by the shipowners against the cargo owners,

Held, that the day on which ice prevents loading will cease to be a weather working day and the cargo owners are therefore exempt from liability under the proviso.

BETTS *v.* RECEIVER FOR THE METROPOLITAN POLICE DISTRICT AND CARTER PATERSON AND COMPANY, LIMITED. (1932) 2 K. B. 595.

Public Authorities Protection Act, 1893—Act done by public officer in intended execution of public duty—Possession taken by officer of goods of plaintiff on suspicion—Goods handed over to supposed owner—Action by true owner—Limitation for claim—Liability of officer.

On suspicion, the police searched the house of J. B., the plaintiff and discovered there some jewels and goods, including 15 rolls of cloth and took possession of them on 12th December, 1924. He was tried and convicted of having received stolen articles, to wit, the jewels. But no evidence was given in support of the indictment relating to the 15 rolls of cloth. On 2nd April, 1925, the police handed over the rolls of cloth to C. P. and Co., who claimed as true owners thereof, after taking from them an indemnity to indemnify the police from claims relating thereto. On 16th January, 1931, the plaintiff brought an action against the Receiver of the Metropolitan Police District and C. P. and Co., claiming damages for detinue, etc. The jury found that the cloths were not proved to belong to the defendants.

Held, that it is doubtful whether the Act protects a public officer who, while rightly apprehending the facts, takes a mistaken view as to his legal obligations, and executes or intends to execute some function which he has no duty to execute. On the other hand, if a public officer makes an honest mistake of fact and does that which it would be his duty to do if his view of the facts were correct, he is acting in intended execution of a duty within the meaning of the section. When an officer of the Police force comes under a legal obligation to hand to their true owner goods of which he has become possessed in the course of performing his duties to the public, that obligation is a "public duty". Limitation for the claim ran not from the date of demand but earlier and the claim was therefore barred against the public officer.

FARR *v.* BUTTERS BROTHERS AND COMPANY, (1932) 2 K. B. 606.

Negligence—Crane manufacturer—Sale of defective crane—Crane erector working the crane with knowledge of the defects—Death of erector by accident—Liability of manufacturer—Fatal Accidents Act.

The defendants, crane manufacturers, sold a crane to a firm of builders, who had an experienced crane erector in the deceased. The crane was sold in parts. While erecting the crane, the erector noticed certain defects in the crane, that the cog-wheels worked with unusual stiffness and did not fit properly. But he however worked the crane and while it was working it fell on him and killed him. The employee's widow brought an action against the manufacturers under the Fatal Accidents Act.

Held, that the defect in the parts was patent and discoverable, and was in fact discovered by the deceased before he put the crane in operation. Yet he took his chance of operating it without remedying the defect or testing the crane to see whether it would work before putting it into operation. Therefore there was no cause of action for alleged negligence, if there was negligence.

Caledonian Ry. Co. v. *Mulholland*, (1898) A. C. 216, followed.

REX *v.* ALFRED GEORGE HINDS, (1932) 2 K. B. 644.

Criminal Law—Summing up to the jury—Identification parade—Witnesses who had already seen photographs before arrest of the accused—Court if to direct the jury that such evidence was not of much weight.

Certain witnesses, who had prior to the arrest, been shown photographs with a view to ascertaining whether they could pick out

a person not yet in custody so that he might be arrested on suspicion, were called in to identify the accused at an identification parade. In summing up to the jury Avory, J., said: "The law, so far as it is necessary to apply it in this case . . . . is this: that there is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or a series of photographs to see if they can pick out any one of them which resembles the person whom they think they would be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him or her a photograph of the actual person whom they have already identified."

Held, that this is a sufficient and correct direction and that it is not essential to state that the evidence of these witnesses was less valuable than it would otherwise have been, by reason of their having identified them earlier in the photographs.

Rex v. *Dwyer and Ferguson*, (1925) 2 K.B. 799, distinguished.

JOTTINGS AND CUTTINGS.

Literature in Court.—Since the departure of Lord Darling from Court IV of the King's Bench Division there is a certain dearth of Judges who illumine their dull cases by literary quotations. Maugham, J., is one of those who are not ignorant of non-legal works, but he holds his knowledge in reserve and does not display it even for purposes of humorous relief Both he and my lord Atkin have recently shown their ability to distinguish between the original and the common-place in copyright cases.

Scrutton, L. J., is the Judge who is most given to quotations. In supporting the judgment of the Divisional Court in the *Maloney Case*, he not only helped to enlarge the number of legal definitions, but quoted no less than three works or persons of literary genius in the process: Dean Swift, the Book of Common Prayer, and the Workmen's Compensation Acts. Did the word "sickness" in a contract cover incapacity due to an injured thumb? That was the question. Dean Swift used the word as appropriate to the condition sometime felt on a Channel crossing: "You are sick in the mulligrubs through eating chopped hay". The Prayer Book (in connection with Holy Matrimony) united the spouses in sickness and in health: "sickness" clearly covering a serious injury to the thumb; and the Workmen's Compensation Acts spoke of "sickness benefit" with the same inclusive meaning. The appeal was accordingly dismissed with costs.—*L. J.* 1932, p. 315.

The Prince a Lawyer.—Lawyers will remember that H. R. H. The Prince of Wales, who will soon open the New Parliament Buildings at Stormont, is a member of the Bar, and a Bencher of the Middle Temple. His call, like that of other members of the Royal Family, was quickly done. He became a student, dined, was called and became a Bencher all in the course of an evening in the Middle Temple Hall; thereafter you will find that he ranks first on the list of Benchers of his Inn; with Lord Trevethin, Mr. English Harrison, Lord Parmoor, Sir R. A. McCall and Lord Carson coming next in order. So the Prince and Lord Carson are Benchers of the same House.

Of the other Royal Benchers, His Majesty the King is of Lincoln's Inn, and H. R. H. the Duke of York of the Inner. While Gray's Inn, vey ancient and very remote from the Law Courts, has no less than three Royal representatives: H. R. H. the Duke of of Gloucester, H. R. H. the Duke of Connaught, and H. R. H. Prince Arthur of Connaught.

These Royal Persons do not forget their respective Inns. Not infrequently, especially on Grand Nights, they appear and dine at the high table with other Benchers.—*L. J.* 1932, p. 319.

Young Silks.—One hears sometimes that the giving of silk to a barrister of less than ten years' standing is unprecedented. This is not so. Francis North was called to the Bar in 1661, and after seven years was made a "silk". Sir Samuel Evans, former President of the Probate, Divorce and Admiralty Division in England, was called to the Bar in June, 1891, and was made Q. C. in February, 1901. Benjamin and Sir Edward Carson were also of less than ten years' standing at the English Bar when they became "silks". When Lord Alverstone, C.J., became a Q. C. in 1878, he had just completed his tenth year at the Bar, and Lord Haldane was of eleven years standing. When John Simon, F. E. Smith and Mr. Hemmerde were made "silks" in the same batch in 1908 their united standing at the Bar was less than 30 years. Never before or since have three barristers so junior been included in the same list.

When Francis Bacon, the first Q. C., was reappointed on the accession of James I, he was described as "one of our counsel learned in the law". This phrase is still employed in the K C.'s patent and by Judges when inviting the newly-made leader to take his seat within the bar.—*L. J.* 1932, p. 319.

Importation of Scots Legal Terms.—Every habitue of the Courts is familiar with the growing popularity of the word "implement" signifying to carry out, as, for example, to implement a contract. This is an importation from the vocabulary of the Scots

lawyer, although it seems not to have met with the approbation of linguistic purists. Thus, David Irving, a Scotsman, in his "Elements of English Composition," published in 1841, speaks of the word as derived from "the barbarous jargon of the Scotish (*sic*) Bar," the spelling "Scotish" being a fetish of his own. But the word "implement," which has come to stay, is not the sole importation from the north to creep into the language of our Courts, although it has certainly proved the most popular. Last week in the Court of Appeal Council in the course of his argument quoted a passage from the speech of Lord Haldane in *Port of London Authority* v. *Orsett Union Assessment Committee*, (122 L. T. Rep., at p. 725; (1920) A. C. at p. 286), where that noble Lord said this: "The old dock companies carried on business in order to make profits, and the scheme or the Act of 1908 appears to have been to give their stockholders a surrogatum in the shape of a new stock." This word "surrogatum" excited some interest on the Bench and the Oxford Dictionary was immediately sent for to investigate its history and use, and there it was found to be one of the words derived from Latin which had found acceptance among Scots lawyers, the sole instances of its use being from Scots legal writers, Lord Kames and John Erskine, as meaning something put in the place of another; a substitute. Attention having thus been drawn to a good sounding word it will be of interest to note whether it will have a success similar to that attained by "implement," although this is hardly likely notwithstanding the satisfaction some persons experience when a new word is added to their vocabulary. Lord Dunedin, who is a master of language, gave currency to the word "equiparate," but apparently this has not caught on with English lawyers. "Equiparate" is used by some of the older English writers, but is marked in the Oxford Dictionary as no longer in use. Whether it ever had a vogue at the Scots Bar does not appear, but it has a certain attractiveness and utility.—*L. T.* 1932, p. 388.

The Duties of an Advocate.—We had always thought it an essential part of an advocate's duty to place his client's argument before the Court without himself judging of his merits, except to consider how it should be presented. We make this rather trite observation because of some recent remarks by the Leeds Stipendiary Magistrate in a case in which a local solicitor, Mr. D. I. Sandelson, appeared before him. Mr. Sandelson was, it appears, representing a large motor Company, owning many hundreds of vehicles who had been accused and convicted of permitting two of their drivers to commit certain motoring offences. Pleading in mitigation, Mr. Sandelson stated that his clients had instructed him

that they *were* a careful firm. The learned Magistrate thereupon inquired as to the number of their previous convictions, and learning that they were fourteen in all, declared that Mr. Sandelson should not have accepted these instructions, and that he had failed in his duty to the Court by giving reckless information. To this we would respectfully point out that in the first place, whether or not a person is careful must surely be a matter of opinion, and, therefore, a legitimate subject of argument. Secondly, there was no wilful concealment by the advocate; the facts (the defendant's record) were before the Court, and it was for the Court to decide whether or not it accepted the argument deduced therefrom. Because this ran counter to the view formed by the Court, we find it difficult to understand why the advocate who presented it should have been accused of recklessness and breach of duty. In our view, on the facts as we understand them, Mr. Sandelson seems to have been doing nothing more than his elementary duty to his clients in presenting before the Court the argument on which they wished to rely. So long as an Advocate is, in the memorable words of Lord Chief Justice Cockburn, striving " to accomplish the interest of his clients *per fas*—but not *per nefas* "—we cannot think that the interests of justice are being served by his being rebuked solely because his arguments do not happen to commend themselves to those to whom they are addressed.—*L. J.*, 1932, p. 341.

BOOK REVIEWS.

ON BAIL IN CRIMINAL MATTERS, by M. M. Kotasthane, B.A., LL.B., Advocate, Kalbadevi, Bombay. Price Rs. 1-8-0.

The question of bail in criminal cases has once been much restricted in cases of non-bailable offences. But in 1923 the Select Committee which was appointed to revise the Criminal Procedure Code went into the question and felt that unless the offence was a very serious one the tendency should be to release offenders on bail. Hence some of the changes which were introduced into the Criminal Procedure Code. This little book deals with all the points involved, including the generally intricate problems when questions of remand and further remand arise. Cases both Indian and English are copiously given in order to illustrate the development of the course which has been adopted in the matter of bail grants. The book is useful.

OUTLINES OF CONSTITUTIONAL LAW, by Prof. B. D. Sattigiri, M.A., LL.B. Published by Ramakrishna Brothers, Law Publishers, Poona, 2. 1932 Edn.

In these days of National reconstruction and attempts to establish the Indian Constitution on a fresh basis altogether, it is but

very opportune that books on constitutional law should emerge. But none could be too sanguine to believe that on reading this tiny volume the subject of constitutional law would be mastered. As the author himself confesses, it is only an outline and necessitates the further study of important standard works upon the same theme. We are glad that a perusal of this volume has assured us of its usefulness to students of Colleges who require in a great degree a concise statement of the constitutional law.

BAIL AND RECOGNIZANCE IN CRIMINAL CASES, by B. K. Basu, B.L. 1932 Edn

This is another small publication upon the Law of Bail containing a critical review of the complete case-law of all the High Courts in India. The striking feature of this book is the adequate attention paid to the wants felt hitherto on the subject and the diligent attempt made to satisfy them. Naturally the book is fairly exhaustive.

ELEMENTS OF INDIAN MERCANTILE LAW, by Sohrab R. Davar, J. P. (Bom.), Barrister-at-Law. Sixth edition. Published by Messrs. N. M. Tripathi & Co., Bombay.

It is with pleasure that we welcome the sixth edition of this work within a few years of the appearance of the previous edition. The value of this book has been recognised by those in the line by its being prescribed as a text-book for the students of commerce, accountancy and law for whom it is primarily intended. Since the appearance of the previous edition of this book, several important enactments bearing on mercantile law have been passed by the Indian Legislature, such as the Sale of Goods Act, Partnership Act and some industrial enactments. These have made it necessary for the author to re-write portions of the book and add fresh matter on these subjects. The lucidity of style and the simplicity of treatment of the legal subjects rendering them easily intelligible to comparatively lay readers while not sacrificing any matter of real importance are matters on which the author has to be congratulated. We find that the more important decisions have been noticed in their proper places in the book.

TRIPATHI'S LAWYERS DIARY, 1933. Published by N. M. Tripathi & Co., Bombay. Price Rs. 2.

Both for get up and the useful matter contained in the earlier pages for the lawyer, this diary is highly commendable. One is tempted to possess such a well-sized diary and hardly doubts its attraction for the legal profession.

THE LAW OF MERCANTILE AND LEGAL ARBITRATIONS IN INDIA, by Rai Bahadur Diwan Chand Obhrai. Price Rs. 7.

This a commentary on the Indian Arbitration Act and the provisions of the Civil Procedure Code relating to arbitration. The notes are clear and are given in numbered paragraphs under the various sections and rules. The learned author has avoided discussions and stated the rules as propositions of law and given the decisions supporting those rules in the foot-notes with brief references to the facts of the cases themselves along with their references. The English cases are not referred to as they are not easily accessible in the moffussil. In the preparation of the book, the learned author has availed himself of the information in the leading Indian works on the subject of arbitration. We hope that the book will be found useful to lawyers and Judges.

THE INDIAN PARTNERSHIP ACT (IX OF 1932), by G. R. Jagadisa Sastri, B.A., B.L. Price Rs. 3-8-0.

This is a commentary on the Indian Partnership Act and the learned author has brought out a lucid commentary upon the provisions of the Act giving references to the Indian cases and the leading English decisions in their appropriate places and noting the changes, such as there are, in the law on the subject. The appendices contain information on suits relating to partnerships, mode of keeping accounts and models of partnership deeds.

THE LAYMAN'S LAW GUIDE, by A. C. Sequeira, M.A., LL.B. Price Rs. 3.

This is the first book of its kind, so far as we are aware, in India. This is an attractive little book which has been written for the purpose of guidance for laymen and, as a consequence, as free as possible from technical expressions. To use the author's own words, what has been set out is, speaking generally, a concise statement of the law in most of its obvious branches followed by cases illustrative of its application in a manner best adapted for ready reference. The author assumes no prior knowledge on the part of the reader and he is led from chapter to chapter by the intrinsic interest of the subject. The subjects dealt with are of great variety and interest and we wish the author every success in this new endeavour.